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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JAMES BARKER, Defendant and Appellant.	B217989 (Los Angeles County Super. Ct. No. BA341669)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carol H. Rehm, Jr., Judge. Affirmed.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant James Barker was convicted, following a jury trial, of selling cocaine in violation of Health and Safety Code section 11352, subdivision (a). The trial court sentenced appellant to six years in state prison. He raises two issues on appeal: (1) his attorney provided constitutionally ineffective assistance, and (2) the recent amendment to Penal Code section 4019,[1] granting four days of conduct credit for every four days of actual presentence custody applies retroactively and, thus, his credits should be increased from 211 days to 422. We conclude (1) appellant's attorney provided constitutionally effective assistance and (2) section 4019 only applies prospectively. Therefore, we affirm.

FACTS

On June 4, 2008, Officer Dale Ziesmer watched from his vehicle at an observation post, on East Sixth Street and Gladys Avenue in downtown Los Angeles (a part of an area known as "Skid Row"), as Peggy Cash handed appellant what appeared to be money in exchange for "something small." Two other officers were alerted. As one of the officers approached Cash, Cash dropped a bag of rock cocaine on the ground, which was recovered by the officer. The officer then detained appellant and found $80 in his pants pocket.

Appellant testified in his own defense at trial and denied selling cocaine to Cash. He stated that Cash asked him for four quarters and he gave them to her. Furthermore, he testified he saw a "lady" and a "Black guy" with a "turban" standing near him and Cash, and that Cash spoke with the man after receiving four quarters from appellant. Appellant also produced evidence that he received a money order from his mother in the amount of $100 on May 15, 2008, and that the $80 found in his pocket was from that money order.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

1. *Ineffective Assistance of Counsel*

After his conviction, appellant made a motion for a new trial predicated on ineffective assistance of his trial counsel, Arthur Lindars. He stated he was not granted a fair trial, because Lindars did not call Peggy Cash as a defense witness, even though Cash was ready and willing to testify and had signed an unsworn statement corroborating appellant's story. Appellant contends the trial court erred in denying his motion for a new trial. On appeal, appellant further contends that his counsel was ineffective in failing to investigate whether any other witnesses were present at the time of the arrest who would corroborate appellant's testimony. We disagree.

"In assessing claims of ineffective assistance of trial counsel, we consider whether [1] counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and [2] whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant . . . bears the burden of establishing constitutionally [ineffective] assistance of counsel. [Citations.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) "The decision[] . . . whether to put on witnesses are matters of trial tactics and strategy which a reviewing court generally may not second-guess. [Citation.]" (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.)

As our Supreme Court has noted, defense counsel may choose not to call certain witnesses for strategic reasons. (*Mitcham, supra*, 1 Cal.4th at p. 1059.) The trial court stated, and we agree, that appellant's counsel may not have called Cash for many strategic reasons, including the fact that Cash was a codefendant and on medication for psychological issues and, thus, had minimal credibility. He made a tactical decision that did not fall below the standard of reasonable representation.

As for appellant's claim concerning other witnesses, first made on appeal, his counsel may not have been able to find other witnesses who were present on the day of the arrest to corroborate appellant's story, considering the arrest occurred at "Skid Row," a place—by appellant's own account—"where homeless people routinely [loiter]." Appellant testified he had seen a "Black guy" with a turban and a "lady" nearby at the time and place of his arrest. These are hardly descriptions that would have warranted further investigation by his counsel; in other words, counsel acted reasonably.

Thus, since counsel acted reasonably, his assistance was constitutionally effective under the first prong of the aforementioned two-pronged test.[2]

2. *Conduct Credits*

Appellant raises a second issue on appeal. He asks that his presentence conduct credits be increased from 211 days to 422, pursuant to the amended version of Penal Code section 4019.

A criminal defendant in presentence custody "may . . . be eligible for presentence good behavior/worktime credits (collectively referred to as ["]conduct credits["]) of up to two days for every four days of actual custody" pursuant to Penal Code section 4019, subdivisions (b)(1), (c)(1), and (f). (*People v. Cooper* (2002) 27 Cal.4th 38, 40.) Senate Bill number 18 recently amended section 4019. The new version went into effect on January 25, 2010, crediting defendants with four days for every four days of actual custody (as opposed to the old version, which credited defendants with two days for every four days of actual custody).

[2] Therefore, we need not address the second prong of the test.

Our courts have been split as to whether the amended version of section 4019 applies prospectively or retroactively.[3] Appellant contends it should apply retroactively and that, as a result, he is entitled to a total of 422 conduct credits to match the 422 days he actually spent in presentence custody. We disagree.

Appellant relies on *In re Estrada* (1965) 63 Cal.2d 740, which holds that "[w]hen the Legislature amends a statute so as to lessen the punishment[,] it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper . . . . It is an inevitable inference that the Legislature must have intended [in the absence of clear legislative intent to the contrary] that the new statute imposing the new lighter penalty . . . should apply to every case to which it constitutionally could apply." (*In re Estrada*, *supra*, 63 Cal.2d at p. 745.)

Estrada, however, is not applicable to the present case because the amendment to section 4019 does not automatically "lessen punishment;" rather, it awards additional *conduct* credit to those who have earned it for good behavior or for performing assigned labor, as opposed to additional *custody* credit, which is awarded to a defendant simply because he or she is in presentence custody. Thus, *Estrada* is not binding in this context and does not require retroactive application of section 4019.

Furthermore, retroactive application of section 4019 would undermine its purpose. "[A] court [may] determin[e] whether the . . . meaning of a statute comports with its purpose." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) "'The purpose of . . .

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[3] This issue is currently before the California Supreme Court in *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808 (holding the amendment does not apply retroactively) and *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963 (holding the amendment applies retroactively). Our courts have been split regarding this issue: the First and Third Districts have unequivocally held that the amendment applies retroactively, while the Fifth and Sixth Districts have unequivocally held it does not. The Fourth District is internally split: its Second Division has held the amendment does not apply retroactively, while its Third Division has held that it does. Our district is also internally split: our First, Sixth, Seventh, and Eighth Divisions have held the amendment applies retroactively, while our Fourth Division has held that it does not.

section 4019 is to encourage good behavior by incarcerated defendants prior to sentencing. [Citations.]' [Citation.] 'Conduct credit is awarded to prisoners in penal institutions to encourage good behavior. [Citation.]'" (*People v. Silva* (2003) 114 Cal.App.4th 122, 127-128.) The only way to advance the statute's purpose of rewarding good behavior would be to apply it prospectively, not retroactively, because behavior can only be influenced before it has occurred. Applying section 4019 retroactively will not encourage appellant to behave appropriately in presentence custody because he is no longer in presentence custody.

We may also glean legislative intent by looking to other enhanced worktime statutes that were amended by Senate Bill number 18. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, which states: "The words of [a] statute must be construed in context . . . and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.") For example, Senate Bill number 18 also amended section 2933.3, which provides credit for inmates who have completed firefighter training. (§ 2933.3, subd. (c).) The amendment added an express provision of retroactivity to the statute, providing credit to inmates dating back to July 1, 2009, even though the statute only took effect on January 25, 2010. (§ 2933.3, subd. (d).) By adding this retroactivity provision, the Legislature demonstrated that it could have added a similar provision to section 4019. Since the Legislature failed to do so, we infer that it did not intend for section 4019 to apply retroactively.

Thus, since section 4019 should only apply prospectively, appellant is not entitled to additional conduct credits.

DISPOSITION

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.